IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 785 of 1993

with

CRIMINAL APPEAL No 1341 of 1993 and
CRIMINAL APPEAL NO. 1342 OF 1993

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KOLI KHODA JIVRAJ

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 785 of 1993
MR MJ BUDDHBHATTI for Petitioner
Mr.S.S.Patel, Addl. PUBLIC PROSECUTOR for Respondent

2. Criminal AppealNo 1341 of 1993 and
Criminal Appeal No. 1342 of 1993
Mr.S.S.Patel, Addl. PUBLIC PROSECUTOR for Petitioner
Mr.M.J.BUDDHBHATTI for the respondent.

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 20/06/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI)

1. These appeals arise from the judgment and order of the learned Addl. Sessions Judge, Jamnagar in Sessions Case no. 45 of 1986 dated 31.5.1993 by which the appellant of Criminal Appeal no. 785 of 1993, Koli Khoda Jivraj, who was original accused no. 1 was convicted for the offence under Sec. 304-I of Indian Penal Code and sentenced to rigorous imprisonment of 7 years and a fine of Rs.200/- in default to undergo further rigorous imprisonment of six months and also for the offence under Sec. 25 of the Arms Act for which he was sentenced to 3 years rigorous imprisonment and a fine of Rs.100/- in default of payment of which he was required to undergo a further rigorous imprisonment of 2 months. The Criminal Appeal no. 1341 of 1993 has been preferred by the State seeking conviction of the accused no. 1 for the offence under Sec. 302 of the Indian Penal Code. The other appeal (Criminal Appeal no. 1342 of 1993) has also been preferred by the State seeking enhancement of the sentence imposed on the accused no. 1 for the offence under Sec. 304-I of the Indian Penal Code. The original accused no. 2 who was convicted for the offence under Sec. 323 of the Indian Penal Code and sentenced to simple imprisonment of one month and a fine of Rs.100/- has not preferred any appeal nor has any appeal been preferred against him.

2. The prosecution version was that the complainant Babu Lakha was having 10 vighas of land in the outskirts of the village Khadba in which there was cotton crop standing on the day of the incident which took place on 23rd October, 1985. At noon time, the younger brother of the complainant Vinu had informed the complainant at his house that the accused no. 1 Koli Khodi Jivraj was grazing his cattle in their field and when he was questioned by Vinu, the accused no. 1 gave him 2 slaps. On receiving this information, according to the complaint, the complainant and his father Lakha Bijal and his uncle's son Babu Bhaga went to the field around 3 o' clock in the afternoon and saw the accused no. 1 with a rifle along with accused no. 2 Daya Parbat who had a

stick. When Lakha Bijal asked as to why was he grazing his cattle in the cotton crop, the accused no. 1 Koli Khoda Jivraj got agitated and accused no. 2 Daya Parbat asked him to fire the gun. Thereupon, the accused no. 1 Koli Jivraj fired the gun at Babu Bhaga who was injured on his right leg and started profusely bleeding from the pellet wounds. The prosecution version in the F.I.R. was that on this happening, the complainant threw his stick in self-defence at the accused no. 1 who got injured on his head. Daya Parbat, accused no. 2 had given a stick blow to Lakha Bijal on his leg and thereafter, the accused no. 1 and Daya Parbat had gone away. According to the complainant, he and his father put Babu Bhaga in a bullock-cart and brought him to Vanana and from there they engaged an autorickshaw and took Babu Bhaga to the hospital at Jam Jodhpur from where they were advised to take him to Jamnagar and while proceeding to Jamnagar in an ambulance, Babu Bhaga died on their way near village Gop. The ambulance was therefore brought back to Jam Jodhpur where Babu Bhaga was declared dead. As per the medical evidence, many pellets had pierced the right thigh of Babu Bhaga and 3 such pellets had gone through. These injuries are clearly established from the deposition of Dr. Kishorebhai at exh. 8 who had issued the certificate exh. 9. The post-mortem notes exh. 14 also bear out these injuries. As per the medical opinion, the death was caused due to profuse bleeding which resulted from the gun shot wounds. The gun-shot wounds caused due to the firing of the gun by the accused no. 1 were sufficient in the ordinary course of nature to cause his death because of the profuse bleeding that resulted therefrom and the shock which was caused due to this injury. The case papers exh. 16 were prepared by the Medical Officer and it appears from the history recorded therein that at the earliest point of time, the name of the accused no. 1 Koli Khoda Jivraj was given as the person who had fired the gun and caused these injuries. The trial court had, from the medical evidence, come to the conclusion that the death of Babu Bhaga was caused due to gun shot injuries. Having regard to the aforesaid medical evidence, we are in agreement with the trial court on this finding.

3. The depositions of the two eye witnesses Babu Lakha and Lakha Bijal as well as the deposition of Vishnu, who gave information to the elders about the accused no. 1 grazing his cattle in their field show that in the afternoon of 23rd October, 1985, on being informed about the grazing of cattle in their field, Babu Lakha, Lakha Bijal and Babu Bhaga had gone to their

field. The version of Babu Lakha in his deposition at exh. 21 is somewhat different from his version in the complaint and he has tried to state before the court that while they were walking after visiting their farm for going to their village, they were followed by the accused no. 1 Koli Jivraj and accused no. 2 Daya Parbat and Koli Jivraj asked them to stop and at the instigation of Daya Parbat, fired the gun injuring Babu Bhaga on his thigh. This improvement in the version of the complainant is obviously made with a view to absolve themselves from the charge in the counter case which was filed against them that armed with lathis they had gone to the field and assaulted the accused no. 1. The witness Lakha Bijal sticks to the version that Vishnu had come and informed him about the grazing of cattle by the accused no. 1 and about the accused no. 1 having given him slaps. After getting this information, he along with his son Babu Lakha and his brother's son Babu Bhaga went to the field where Babu Bhagha was walking ahead and according to this witness, the accused no. 1 fired the gun at him, as a result of which Babu Bhaga fell down. This witness tried to hold Babu Bhaga. In the meantime, he was given a stick blow by the accused no. 2 on his leg. He has stated that they had then taken Babu Bhaga in his bullock-cart for treatment. Vishnu, in his deposition exh. 30 has stated that when he had seen the son of the accused no. 1 grazing cattle, he had accosted him and thereafter the accused no.1 had come there and hit him with the butt of the gun on his back. Thereafter, he had gone home and informed his father and Babu Bhaga who along with Lakha Bijal had gone to the field at about 2.30 p.m. Thereafter, he heard a gun fire and therefore went to the field. On way he saw Babu Bhaga being brought in a bullock cart by his father and one Govind Pala was driving it. The version of accused no. 1 in his statement recorded under Sec. 313 of the Criminal procedure Code was that he was grazing his cattle near the pond where Babu Lakha, Lakha Bijal and Babu Bhaga had come. They started abusing him. He was surrounded by them and Babu Lakha gave a stick blow to him from the back while Lakha Bijal gave a stick blow to him on his face. Babu Bhaga had hit him with a stick on his shoulder. He had stated that he therefore fainted and fell down. He was taken to Vanana by Mepa Jina in the bullock-cart and from there to Jam Jodhpur hospital. At 4 o' clock in the early morning, he regained consciousness. He filed the complaint at 8 o' clock with the police. The medical evidence shows that the accused no. 1 Koli Jivraj was examined by the doctor on 23rd October, 1985 in the evening at 6 o'clock and he was having injuries narrated in para 8 of the deposition of

Dr.Kishorebhai and in the certificate exh. 19 which he had issued in respect of the injuries. As per this certificate there was a contused lacerated wound of the size of 3cm x 1cm salp deep on the right parietal region, a C.L.W. of the size of 6cm x 1cxm xbone deep on the occipital region left side and a defused swelling of the size of 4cm x 4cm on left mandible. The evidence of the prosecution witnesses clearly establishes that the incident did take place around 3 p.m. on 23rd October, 1985., The gun wich was used in the incident was recovered from the house of the father of the accused no. 1 and the Ballistic report shows that the pellets which were recovered from the thigh of Babu Bhaga and those which were recovered from his chorni were the pellets which could have been fired from this gun and that there was an indication that the gun was recently fired. The black powder around the wounds caused by the pellets would show that the gun shot was fired from a near distance. The accused no. 1 had not taken up any theory of self-defence to justify the firing of the gun. The totality of the evidence indicates that there was no prior enmity between the parties but it was because of the grazing of cattle that the things had flared up and there was a sudden quarrel between the accused no. 1 and the accused no. 2 on one side and the complainant, his father and Babu Bhaga on the other who had come to the spot, after being informed by Vishnu that the accused no. 1 was grazing his cattle in their cotton crop. We do not find any substance in the subsequent improvement made by the complainant in his deposition before the court that the accused no. 1 was following them and after asking them to halt, he suddenly fired his gun injuring Babu Bhaga. The facts and circumstances which have been established show that there was a greater probability of a sudden quarrel having taken place between the two sides as a result of which the gun was fired injuring Babu Bhaga on his thigh causing multiple pellet wounds which resulted in severe bleeding, shock and death of Babu Bhaga. As per exception 4 under Sec. 300 of the Indian Penal Code, culpable homcide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue avantage or acted in a cruel or unusual manner. In our opinion, the requirements of exception 4 are satisfied in the present case and the trial court has rightly invoked that exception in holding the accused no. 1 guilty of the offence under Sec. 304-I of the Indian Penal Code. We find ourselves in complete agreement with the reasoning and the findings of the learned trial judge for convicting the accused of the offence under sec. 304-I of I.P.C. We therefore find no

valid reason for changing the conviction to the one under Sec. 302 of the Indian penal Code. The sentence that has been awarded to the accused no. 1 cannot be said to be unduly lenient and we find no reason to enhance it at this distant point of time.

All the three appeals are, therefore, dismissed.

(R.K.ABICHANDANI, J)

(SHARAD D DAVE, J)

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